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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 96

A. T. GORDON, et al.,
Petitioners,

vs.

GRANVILLE H. LANCE, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF

Amicus Curiae on Behalf of the "Committee for the Equal Weighting of Votes" in Support of the Position of the Respondents

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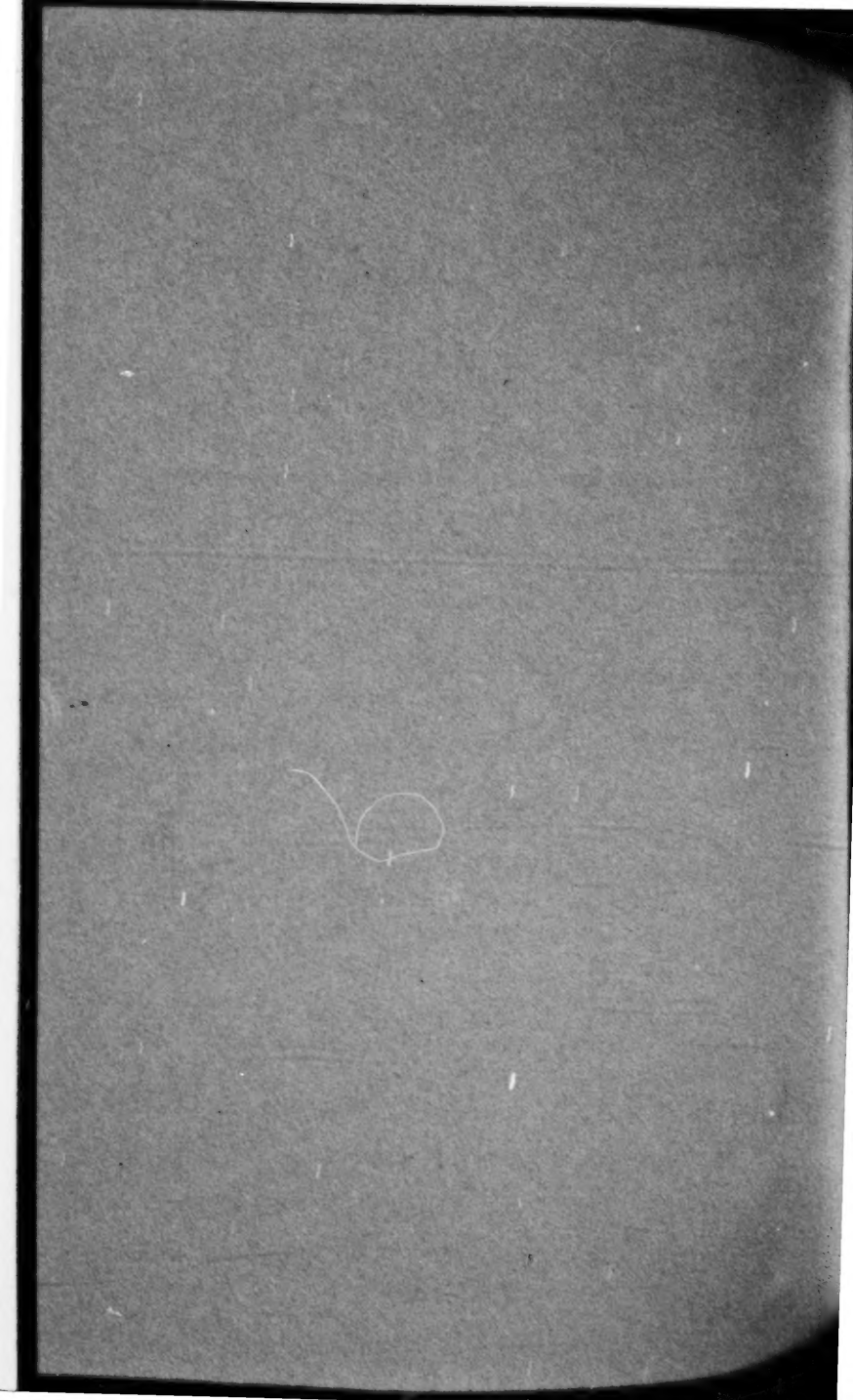

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BRIEF

Amicus Curiae on Behalf of the "Committee for the Equal Weighting of Votes" in Support of the Position of the Respondents

This brief Amicus Curiae is filed with the written consent of the parties, duly filed with the Clerk of this Court, pursuant to Rule 42 of this Court.

This brief is in support of the position of the Respondents who maintain that those provisions of the West Virginia constitution and statutes, which require three-fifths (60%) voter approval of school bond issues or of school tax levies, are repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and that only a simple majority is required.

THE INTEREST OF THE "COMMITTEE FOR THE EQUAL WEIGHTING OF VOTES"

The "Committee for the Equal Weighting of Votes" is a committee comprised of plaintiffs in three cases pending before a three-judge panel of the United States District Court for the Eastern Division of the Eastern District of Missouri.*

These cases seek a determination that those provisions of the Missouri constitution and implementing statutes which require a two-thirds (66⅔%) voter approval for bonds of a city or of a school district or for certain school tax levies are repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and that only a simple majority is required for validating a bond issuance or a tax levy.

These three cases were heard, submitted, and briefed.

The three-judge panel subsequently issued its order deferring its decision until after the United States Supreme Court had heard and decided the instant West Virginia case (October Term, Docket No. 96) now before this Court.

The "Committee for the Equal Weighting of Votes" is filing this brief Amicus Curiae because this Court's decision in the instant case may be dispositive of the issues of the three cases before the three-judge panel of the Eastern Division of the Eastern District of Missouri.

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* These cases are: Preisler, et al., v. The Mayor of the City of St. Louis, et al., Docket No. 69C 250 (1), city bonds; Glaser, et al., v. The Board of Education of the School District of University City, Docket No. 69C 284 (2), school tax levy; and Preisler, et al., v. The Board of Education of the School District Constituted of the City of St. Louis, et al., Docket No. 69C 339 (1), school bonds.

The position of the "Committee for the Equal Weighting of Votes", that only a simple majority is required for the adoption of a proposition for a bond issue or a tax levy of a school district or other subdivision of the State, has received wide public support from organizations** and individual citizens of the St. Louis metropolitan area and of Missouri.

SUMMARY OF ARGUMENT

The principal and fundamental issue of the instant case is the constitutional right of an individual, under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, to cast an equally weighted vote in a public election on propositions authorizing school bonds and school tax levies.

The equal weighting of votes in elections on propositions is an inherent, though unexpressed, constitutional right.

This case stands upon its own facts and issues and need not be considered merely as an extension of the "one person, one vote" doctrine developed by this Court in the apportionment and districting cases. The phrase actually implies *equality* and might more accurately be expressed "one person, one *whole* vote."

However, the now vast number of apportionment and districting cases are helpful to the solution of the issues of the instant case because they declare the right of the

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** Missouri State Teachers Association; Missouri State Labor Council, AFL-CIO; Missouri Municipal League; American Civil Liberties Union of Eastern Missouri; American Civil Liberties of Western Missouri; Cooperating School Districts of the St. Louis Suburban Area; St. Louis Suburban Teachers Association; St. Louis [City] Teachers Association; St. Louis Labor Council, AFL-CIO; St. Louis [City] Teachers Union, AFL-CIO; League of Women Voters of Missouri; American Federation of Teachers, AFL-CIO [national].

qualified voter to an equally weighted vote in situations which are far less obvious and precise than the fixed three-fifths majority requirement of the West Virginia constitution and statutes which extraordinary majority requirement invariably and indisputedly results in an invidiously discriminatory "NO" vote with one and one-half (1½) times, or 150%, the weight of a "YES" vote, which is constitutionally impermissible.

The inherent constitutional right to an *equally weighted* vote has always existed; however, it has been kept from view and consideration, as in the instant case, because of the *mode of expressing* or the *wording* of the West Virginia three-fifths extraordinary majority constitutional and statutory provisions which detracts attention from the comparatively unequal weighting of the "NO" and the "YES" votes. This is a sophisticated mode of discrimination and, as this Court said in *Reynolds v. Sims*, 377 U. S. 533, 563 (1964), "One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination'."

Neither the people nor the legislature of a sovereign state have the power to enact state constitutional provisions or legislation repugnant to the provisions of the Equal Protection Clause of the United States Constitution. "An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of the State's electorate, . . .", said this Court in Lucas v. Forty-fourth General Assembly of Colorado, 377 U. S. 713, 736 (1964).

There is no state interest so compelling that it can override the individual citizen's right to an equally weighted vote in any instance in which a proposition affecting the health, welfare, or education of the citizen or his dependents is being submitted to a vote.

The West Virginia Supreme Court of Appeals in the instant case, 170 S. E. 2d 783 (1969) said, on page 791:

> "[3] For the reasons stated in this opinion, we are of the opinion, and accordingly the Court holds, that *the three-fifths vote requirement* of Article X, Section 8 of the Constitution of West Virginia and Sections 4 and 14 of Article 1, Chapter 13, Code, 1931, as amended, and *also the sixty percent requirement* of Article X, Section 1 of the Constitution of West Virginia and Section 16 of Article 8, Chapter 11, Code, 1931, as amended, *are in conflict with and violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and that, therefore, such provisions are void and unenforceable. . . .*" (Emphasis supplied.)

The "Committee for the Equal Weighting of Votes" respectfully urges the Court to find the challenged constitutional and statutory sections of the instant case violative of the Equal Protection Clause of the United States Constitution, void and unenforceable, and to find further that only a simple majority of votes cast is necessary for the adoption of the propositions for the school bond issue and the school tax levy.

ARGUMENT

I

The right of a voter to cast an equally weighted vote in a public election on propositions authorizing school bonds and school tax levies is protected by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The right of a voter to cast an *equally weighted vote* in a public election is an inherent, though not expressed, right in the electoral processes of a democracy. That a right is not enumerated in either the United States Constitution or a state constitution is no impediment to the existence of the right. [*People v. Belous,* 80 Cal. 354, 360 (1969), cites examples of such unenumerated but existing rights.]

The basic right to an equally weighted vote on propositions submitted to the electorate is protected by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Thus the United States Supreme Court, in *Reynolds v. Sims,* 377 U. S. 533 (1964), at page 555 said:

> "*The Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections* . . . And [*that*] *the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.*" (Emphasis supplied.)

and in *Gray v. Sanders,* 372 U. S. 368 (1963), in discussing the complicated Georgia county unit voting system which resulted in a weighting of the votes in less populous coun-

ties more heavily than the votes of the more populous counties, the Court, at page 381, said:

> "... *But once the class of voters is chosen and their qualifications specified, we can see no constitutional way by which equality of voting power can be evaded.* ..."
>
> "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, and Nineteenth Amendments, can mean only one thing—*one person, one vote.*" (Emphasis supplied.)

The instant case is not to be considered solely as an extension of the "one person, one vote" doctrine enunciated by this Court but is independently and of itself founded on the constitutional concepts of the Equal Protection Clause, perhaps more accurately to be called, "one person, one *whole* vote".

The inherent constitutional right to an equally weighted vote always existed; however, in the extraordinary majority voting requirements it has been kept from view and consideration because of the *mode of expressing* or the *wording* of the three-fifths majority constitutional and statutory provisions which detracted attention from the comparatively and grossly unequal weighting of the "NO" and the "YES" votes which were thereby created.

The equality of the vote was first succinctly expressed by this Court in *Gray v. Sanders,* above, 372 U. S. 368, 381 (1963), as "one person, one vote". There had been many state supreme court decisions, in the nearly half-century before *Baker v. Carr,* 369 U. S. 186 (1962), in which the state courts had decided that legislative apportionment or districting within a state was unconstitutional under *state* constitutional *provisions requiring equally populated districts.* The federal court decisions following *Baker v.*

Carr, however, are based on the judicial construction of the Equal Protection Clause of the Fourteenth Amendment [*Reynolds v. Sims,* 377 U. S. 533 (1964), through *Hadley v. Junior College District,* 397 U. S. 50 (1970)] and Article I, Section 2, [*Wesberry v. Sanders,* 376 U. S. 1 (1964) through *Kirkpatrick v. Preisler,* 394 U. S. 526 (1969)] of the United States Constitution. The federal cases decided on the basis of the Equal Protection Clause found that one person's vote was unconstitutionally debased or diluted or unequally weighted if the maximum population difference between districts was sufficiently great as to cause invidious discrimination between voters residing in different districts.

There is no necessity in the instant case of interpreting the *meaning* or *intent* of the words of the West Virginia Constitution; the *three-fifths requirement* is *clear and invariable.* In this respect the instant case is unlike the apportionment and districting cases where the population disparities between districts were of different magnitudes and constantly changing. Since inequality of the weight of the votes of voters arising from a difference of a few percent of population of districts has been found in the by now numerous cases to be individiously discriminatory to some voter, then such a difference as fifty percent in the effective weight of a voter's vote is unquestionably discriminatory.

In the instant case, *Lance v. Board of Education of Roane County,* on page 790, the West Virginia Supreme Court of Appeals considers the general principles of equality of vote weighting to apply to the instant case, saying:

> "We are of the opinion that the 'one person, one vote', principle is now firmly established in broad general terms without qualification or exception. Certainly the right of the voter to equal protection, the

right to protection against the dilution or debasement of the weight or force of an individual's vote, is fully as sound, sacred and important when he is voting on issues involving taxation, public revenue and the promotion of an adequate public school system, as when he is voting for the nomination or election of a constable, a state senator, a governor or any other public official to represent the voter in government."

And, at page 791, the West Virginia Court continues:

"If the right of a voter can be legally diluted or debased by the sixty percent requirement, it would seem to follow necessarily that it could be further diluted or debased legally by a seventy-five or a ninety percent requirement. In other words, if the weight and force of a person's vote can be debased and diluted in accordance with the contention of the defendants in this case, we see no escape from the conclusion that the weight and force of such a vote may legally be debased and diluted virtually to the point of total extinction."

Obviously the Court supports an equally weighted vote and considers any extraordinary majority invalid.

This Court states its principle on the equal weighting of votes in *Hadley v. Junior College District*, 397 U. S. 50 (1970), as follows, at page 54:

"*This Court* has consistently *held* in a long series of cases, that *in situations involving elections*, the *States are required to insure that each person's vote counts as much*, insofar as it is practicable, *as any other person's*. We have applied this principle in congressional elections, state legislative elections, and local elections. The consistent theme of those decisions is that *the right to vote* in an election *is protected* by the United States Constitution *against dilution or debasement*.

> "When a court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in *an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election.*" (Emphasis supplied.)

and this Court concludes, at page 59, saying:

> "[B]ut once a state has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications specified, we see *no constitutional* way *by which equality* of voting power *may be evaded.' Gray v. Sanders*, 372 U. S. 368, 381 (1963)." (Emphasis supplied.)

II

The right to cast an equally weighted vote may not be impaired because of the WAY in which the voter voted. The minority frustrates the will of the majority by the unconstitutional device of the unequal weighting of the vote of the individual voter resulting from the extraordinary majority requirements.

The *gross and invidiously discriminatory inequality* of the *weight* of the vote of the voter who votes affirmatively, "YES", as compared to the *weight* of the vote of the voter who votes negatively, "NO", in an election which by law requires a three-fifths majority for adoption of a proposition *is not apparent from such statements of the law* appearing in the West Virginia constitution and implementing statutes as follows: in Article X, Section 1 of the Constitution of West Virginia, "*[n]o increase shall be effective unless at least sixty percent of the qualified voters shall favor such increase.*"; in Section 16 of Chapter 11, Article 8 of the West Virginia Code, "*[I]f at least sixty cent of the voters cast their ballots in favor of the addi-*

tional levy, the local levying body may impose the additional levy."; in Article X, Section 8 of the Constitution, "*[s]hall have first been submitted to a vote of the people, and have received three-fifths of all of the votes cast for and against the same.*"; and in Sections 4 and 14, of Chapter 13, Article 1 of the Code, "*[I]f three-fifths of all of the votes cast for and against the proposition to incur debt and issue negotiable bonds shall be in favor of the same,*".

And Justice Black dissenting in *Colegrove v. Green*, 328 U. S. 549 (1946), overruled in effect by *Baker v. Carr*, said at page 569:

> "[The] 'equal protection clause of the Fourteenth Amendment forbids . . . discrimination. It does not permit the States to pick out certain qualified citizens or groups of citizens and deny them the right to vote at all. . . . *No one would deny that the equal protection clause would also prohibit a law that would expressly give certain citizens a half-vote and others a full vote.* . . .
> Such discriminatory legislation seems to be exactly what the equal protection clause was intended to prohibit.' " (Emphasis supplied.)

And as Justice Douglas dissenting in *MacDougal v. Green*, 355 U. S. 281 (1948), [overruled in *Moore v. Ogilvie*, 394 U. S. 814 (1969)], said at pages 288 and 290:

> "Free and honest elections are the very foundation of our republican form of government . . . Discrimination against any group or class of citizens in the exercise of these constitutionally protected rights deprives the electoral process of integrity.
>
> "None would deny that *a state law giving some citizens twice the vote of other citizens in either primary or general election would lack that equality which the*

> *Fourteenth Amendment guarantees . . . The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards* for popular representative government." (Emphasis supplied.)

In the instant case, the voters are equally qualified, yet the State Constitution and implementing statutory provisions require, in effect, that the negative, "NO," votes are weighted one and one-half (1½) times, or 150%, as much as the affirmative, "YES," votes by the imposition of the three-fifths majority requirement. *There can be no acceptable basis for such a distinction between qualified voters.* Once the class of qualified voters has been established, this Court has not recognized any acceptable basis for deviation from its "one person, one vote" principle which *implies equality*, that is, "one person, one *whole* vote."

The application of the three-fifths rule *generates* two classes of voters, voters who voted "NO" and voters who voted "YES" and, as such, the individual "NO" votes are grossly and invidiously discriminatory being unequally weighted as between members of the two classes formed.

The three-fifths majority requirement of the instant case is unconstitutional because it allows a *minority*, selected solely on the basis of *the way* its voters voted, to frustrate the will of the *majority* who voted the other way.

However, the vast number of *apportionment and districting cases* are helpful to the solution of the issues of the instant case because they *declare the right to an equally weighted vote in discriminatory situations which are far less obvious and precise than the three-fifths majority requirement* which is fixed and invariable and *indisputably results in a "NO" vote with one and one-half*

(1½) *times, or 150%, the weight of a "YES" vote,* which result is *constitutionally impermissible.*

In *Bogert v. Kinzer* (Idaho Supreme Court), 465 P. 2d 639, 650 (1970), Judge Donaldson, dissenting, commented that the Equal Protection Clause *applied* to a dilution of the vote in a municipal bond election by virtue of the two-thirds requirement, saying:

> "• • • [i]t is not disputed that by requiring a ⅔ majority of favorable votes to pass a bond issue that negative voters have twice as much voting power in the bond election as to the affirmative voters. Apart from this discrepancy there is no difference in the qualifications of the voters. Therefore there is discrimination. However it is not directed at sex, residence, color, economic status, or geographic location, but it is directed at *a class of persons who happen to hold a particular point of view* and results in a *functional discrimination.* That a point of view may not be discriminated against is clear from Carrington v. Rash, 380 U. S. 89, 85 S. Ct. 775, 13 L. Ed. 2d 675 (1965),
>
> > '• • • [*f*]*encing out from the franchise* a sector of the population *because of the way they may vote is constitutionally impermissible.*' 380 U. S. 89, 94.
>
> *It is a sophisticated rather than simple minded discrimination* since the debasement or dilution only occurs when the voter decides upon which place on the ballot to place his 'X'. The United States Supreme Court said in Reynolds v. Sims, *supra, 'One must be ever aware that the Constitution forbids "sophisticated as well as simple minded modes of discrimination".'* " (Emphasis supplied.)

The California Supreme Court in *Westbrook v. Mihaly,* Sup., 87 Cal. Reptr. 839 (1970), supports the conclusion

that the extraordinary majority requirements discriminated between affirmative and negative votes, saying at page 851:

> "[12] Next, we are advised that because section 18 deprives no one of his right to vote on bond propositions and because each vote is 'fully counted,' there is no discrimination, invidious or otherwise, against which the equal protection clause historically has been directed. It is always easier to assume away a problem than to resolve it. However, we think respondents' suggested assumption distorts reality. It does not require extended discussion to establish that the inevitable result of any extraordinary majority requirement is to give to one group of voters a greater influence on the outcome of an election than to another group of comparable size but opposite conviction. This is the functional equivalent of according to each person in the former group a vote of relatively greater weight precisely because of his position on the issue which is to be decided. In other words, a result identical to that produced by a two-thirds vote requirement could be achieved by requiring only a 50 percent affirmative vote for passage of bond issue propositions but providing that in tabulating the election results each negative vote would be multiplied by two while affirmative votes would be counted at face value. Alternatively, those citizens who opposed a measure could be permitted to vote twice while those who favored it were limited to only one ballot. The biased structure of both of these voting schemes is perhaps more obvious than the discrimination inherent in an extraordinary majority vote requirement. The effect of each, of course, is identical. "If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend

that the discrimination was allowable. [Citation.]" (Gray v. Sanders, *supra*, 372 U. S. 368, 379, 83 S. Ct. 801, 808.)[35]

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[35] As stated by Justice Black, dissenting, in *Colegrove v. Green*, supra, 328 U. S. 549, 569-570, 66 S. Ct. 1198, 1210: "No one would deny that the equal protection clause would * * * prohibit a law that would expressly give certain citizens a half-vote and others a full vote. * * * [T]he Constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast." See also the opinion of Justice Douglas, dissenting, in South v. Peters (1950), 339 U. S. 276, 279, 70 S. Ct. 641, 643, 94 L. Ed. 834: 'There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have * * * the vote counted at full value without dilution or discount [citation] * * *. That federally protected right suffers substantial dilution * * * [where a] favored group has full voting strength * * * [and] [t]he groups not in favor have their votes discounted.'"

Although the question of whether such discrimination is allowable has not been settled by the Fifteenth or the Nineteenth Amendment, we think it equally apparent that when a state weights the negative vote more heavily than the affirmative vote, no one can successfully contend that there is *no* discrimination."

III

The electorate is not empowered to enact state constitutional or statutory provisions which impair the citizen's right under the Equal Protection Clause to an equally weighted vote on propositions for school bonds and tax levies.

Provisions of the West Virginia Constitution enacted by the people, as here in the instant case, when repugnant to the provisions of the Equal Protection Clause of the Four-

teenth Amendment to the United States Constitution, are invalid and void.

The lack of power of the people of a sovereign state to enact state constitutional provisions or legislation repugnant to the provisions of the Equal Protection Clause of the United States Constitution is extensively discussed in one of the leading apportionment or districting cases, *Lucas v. Colorado General Assembly,* 377 U. S. 713 (1964). In this case, the electorate of the State of Colorado enacted, by a majority of the voters voting on the question, a constitutional amendment apportioning the State; this apportionment was held to be invalid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The United States Supreme Court said, at page 736:

> "*An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate,* if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause. Manifestly, the fact *that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality* or to induce a court of equity to refuse to act. As stated by this Court in *West Virginia State Bd. of Educ. v. Barnette,* 319 U. S. 624, 638, '*One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.*' "[29] (Emphasis supplied.)

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[29] And, as stated by the court in *Hall v. St. Helena Parish School Bd.*, 197 F. Supp. 649, 659 (D. C. E. D. La. 1961), aff'd, 368 U. S. 515, "*No plebiscite can legalize an unjust discrimination.*" (Emphasis supplied.)

And at pages 736 and 737 the Court said:

"A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."[30] **(Emphasis supplied.)**

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[30] In refuting the majority's reliance on the fact that Amendment No. 7 had been adopted by a vote of the Colorado electorate, Judge Doyle, in dissenting below, stated:

"The protection of constitutional rights is not to be approached either pragmatically or expediently, and though the fact of enactment of a constitutional provision by heavy vote of the electorate produces pause and generates restraint *we can not,* true to our oath, *uphold such legislation in the face of palpable infringement of rights.* Thus,, state racial legislation would unquestionably enjoy overwhelming electorate approval in certain of our states, yet no one would argue that this factor could compensate for manifest inequality. It is too clear for argument that constitutional law is not a matter of majority vote. Indeed, *the entire philosophy of the Fourteenth Amendment teaches that it is personal rights which are to be protected against the will of the majority.* The rights which are here asserted are *the rights of the individual plaintiffs to have their votes counted equally with those of other voters.* . . . [T]o say *that a majority of the voters today indicate a desire to be governed by a minority, is to avoid the issue which this court is asked to resolve.* It is no answer to say that the approval of the polling place necessarily evidences a rational plan. *The plaintiffs have a right to expect that the cause will be determined in relation to the standards of equal protection. Utilization of other or different standards denies them full measure of justice."* 219 F. Supp. 922, at 944. (Emphasis supplied.)

"We hold that the fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause as delineated in our opinion in Reynolds v. Sims. **And we conclude that the fact that a practicably available political remedy, such as initiative and referendum, exists under state law provides justification only for a court of equity to stay its hand temporarily while recourse to such a remedial device is attempted or while proposed initiated measures relating to legislative apportion-**

ment are pending and will be submitted to the State's voters at the next election." (Emphasis supplied.)

The California Supreme Court in *Westbrook v. Mihaly*, Sup., 87 Cal. Rptr. 839 (1970), *cites with approval* at page 861 [18, 19] the foregoing paragraphs from *Lucas v. Colorado General Assembly* saying:

> "More fundamentally, *popular approval* of electoral systems which *infringe* an individuals' constitutionally protected right to cast an equally weighted vote *is irrelevant.*" (Emphasis supplied.)

The electorate cannot constitutionally enact under the Equal Protection Clause such provisions as those requiring that three-fifths of the voters voting must approve the school bond issue or school tax levy. It is immaterial whether the three-fifths requirement was proposed by a constitutional convention, the General Assembly, or even by the initiative, and then presented to and ratified by the people. This was clearly indicated by the United States Supreme Court in *Lucas v. Colorado General Assembly*, above.

There is nothing in the United States Constitution which affects the right of the people of this State to adopt any state constitutional or statutory provision they desire which restricts or inhibits, in whole or in part, the authority of Boards of Education, or other political subdivision governmental bodies, to levy taxes and incur indebtedness and to limit the same. There is no United States Constitutional provision prohibiting the authorizing of bond issues and tax levies of a state by some other method of approval than the submission to a vote of the electorate.

But *if the people of the State retain unto themselves through their State Constitution the final authority to determine by an election whether or not taxes should be*

levied or indebtedness incurred, then the expressed and implied *equal vote weighting* of the "one person, one vote" *principle* developed in the apportionment and districting cases *must apply to that election* as in the submission of the choice of competing candidates for public office; and *when a proposition is submitted to the vote of the electorate, each vote must be weighted the same regardless as to whether it is voted "NO" or "YES".*

In many states and their subdivisions bond issues and tax levies are decided upon by state or local legislative or administrative bodies and such procedures do not conflict with the Equal Protection Clause provisions of the United States Constitution. [The recent review "Judicial Activism and Municipal Bonds: Killing Two-Thirds with One Stone?" by J. H. Mershon, 56 Virginia Law Review 295, 331 (1970), tabulates the requirements for the issuance of bonds by the authorities of the several states.]

A three-judge United States District Court of the Fourth Division of the District of Minnesota, in *Rimarcik v. Johansen,* 310 F. Supp. 61 (1970), states the general standards applicable to an extraordinary majority, at page 65:

> "[5] Our initial concern is to determine the standard we must apply in evaluating the classification made by § 2. In *Reynolds v. Sims,* 377 U. S. 533 (1964), the Supreme Court said, '(S)ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of a citizen to vote must be carefully and meticulously scrutinized.' Thus, when a state statute affects a citizen's fundamental right to vote, it is not afforded the deference usually given to the judgment of state legislatures. See, *e. g., Kramer v. Union School District No. 15,* 395 U. S. 621, 627 (1969); *Cipriano v.*

City of Houma, 395 U. S. 701, 706 (1969); *Harper v. Virginia State Board of Elections,* 383 U. S. 663 (1966). The test is not whether there is a 'rational basis' for the distinctions made, but rather whether the distinctions are necessary to promote a compelling state interest. *Kramer v. Union School District No. 15, supra* at 627-628. This exacting standard applies not only to cases in which a state statute denies the franchise, e. g., *Kramer,* but also to cases in which a state statute dilutes or debases a vote. As stated by the Court in *Reynolds v. Sims, supra* at 555, '(T)he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.' "

The District Court continues (on pages 67 and 68) and applies the standards to the issue of the unconstitutionality of the requirement of an affirmative vote in excess of a simple majority.

"[8] We view the underlying policy of the one man, one vote cases as establishing a basic constitutional principle—equality among voters.[7]

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[7] As stated by Justice Douglas in his dissenting opinion in *South v. Peters,* 339 U. S. 276, 279 (1949), cited by the Court in *Reynolds v. Sims,* 377 U. S. 533, 555, n. 29:

> "There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. . . . It also includes the right to have the vote counted at full value without dilution or discount. . . . That federally protected right suffers substantial dilution . . . (where a) favored group has full voting strength . . . (and) (t)he groups not in favor have their votes discounted."

Insofar as that principle is concerned, the one man, one vote cases are not substantially distinguishable

from the case at bar. Each case of course must be decided on its own merits. Plaintiff's claim presents us with two issues: First, whether § 2 does in fact discriminate against a class of voters; and second, if it does, is such discrimination violative of the Equal Protection Clause. We believe the one man, one vote cases do provide us with substantive guidelines under the concept of equal protection to be applied in the resolution of these issues.[8]

With respect to the first issue, we believe that § 2 does discriminate against a class of voters; namely, those who vote 'Yes' on a proposed amendment. The efficacy of the 'Yes' vote is effectively diminished by the 55% voter approval requirement. The basis for the discrimination is that the statute, in granting the franchise in the manner it does, ascribes a value to the vote according to the voter's preference on the issue to be decided in the election. It thereby grants those opposed to the amendment a disproportionate voice in the outcome of the election. The remaining issue we must determine, then, is whether the state in so granting the franchise has done it in such a manner as to violate the Equal Protection Clause.

[9] The command of the Fourteenth Amendment is that '(n)o state . . . shall deny to any person within its jurisdiction the equal protection of the laws.' The 'concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged.' *Reynolds v. Sims, supra,* at 565. Uniform treatment does not mean that a state may never distinguish between citizens. *Avery v. Midland County, supra,* at 484. *Carrington v. Rash,* 380 U. S. 89, 92 (1965). The Supreme Court has

stated that the test is whether the statute, by distinguishing between citizens, constitutes an invidious discrimination against those disadvantaged by the classification. *Avery v. Midland County, supra,* at 484; *Reynolds v. Sims, supra,* at 561. This test is to be made on the basis of all relevant factors, including, when the statute affects a fundamental right, whether the classification is necessary to promote a compelling state interest. *Kramer v. Union School District No. 15, supra.*

IV

No state interest is so compelling that it can override the individual citizen's right to an equally weighted vote in any instance in which a proposition affecting the health, welfare, or education of the citizen or his dependents is being submitted to a popular vote.

The right of a citizen to an equally weighted vote is as fundamental as the right to vote itself; and the right to vote is preservative of other basic civil and political rights.

The necessity of extraordinary majority voting requirements for promoting a "compelling state interest" is discussed in several recent cases. A careful distinction must be drawn between those instances in which a citizen's personal rights, such as the health, welfare, or education of the citizen or his dependents is involved in the proposition submitted to the electorate, as in *Rimarcik v. Johansen,* 310 F. Supp. 61 (1970); *Westbrook v. Mihaly,* Sup., 87 Cal. Reptr. 839 (1970), and those cases in which the state has an interest as in its governmental structure, such as the annexation of one subdivision of the state to another as in *Adams v. City of Colorado Springs,* 308 F. Supp. 1397 (1970), affirmed ... U. S. ..., 38 L. W. 3506, or the incorporation of unincorporated territory, as in

Clay v. Thornton, 169 S. E. 2d 617 (1969); dismissed, *Turner v. Clay*, 397 U. S. 39 (1970).

In the cases in which the citizen's personal rights were being determined, the decisions upheld the equality of the weighting of the vote of the individual citizen; in the cases involving the states interest in the territories of its subdivisions, extraordinary voting requirements were upheld.

The California Supreme Court in *Westbrook v. Mihaly*, Sup., 87 Cal. Rptr. 839 (1970), found that state's extraordinary two-thirds majority requirement (California Constitution, former Article XI, Section 18; present Article XIII, Section 40) for the adoption of propositions for school bonds or municipal bonds is not necessary for the attainment of any compelling state interest, neither under the present conditions of society nor under the present conditions of the greatly expanded protection afforded the right to vote. The Court, at page 847, said:

> "[8] . . . [T]he period in which section 18 was adopted was not greatly concerned about inequalities in the electoral process.[17]

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[17] Thirty years were still to elapse before the Seventeenth Amendment sanctioned popular election of United States Senators, and it would be forty years until the Nineteenth Amendment extended the franchise to women.

> For example, even though the Fifteenth Amendment, forbidding denial or abridgement of the right to vote on racial grounds, had been ratified only eight years earlier, most of the delegates to the Constitutional Convention believed that Californians of Chinese ancestry should not be permitted to vote and only grudgingly limited the exclusion to 'natives of China.' (Gaylord, 'History of the California Election Laws,' West's Election Code, p. 41.) Much water has gone under the bridge since the 1870's and we may not re-

solve this problem by applying the standards of that era. (See, e. g., Brown v. Board of Education, etc. (1954), 347 U. S. 483, 492, 74 S. Ct. 686, 98 L. Ed. 873.) 'Our understanding and conception of the rights guaranteed to the people by the "stately admonitio[n]" of the Fourteenth Amendment have deepened, and have resulted in a series of decisions, enriching the quality of our democracy, which certainly do not codify State's rights, governmental theories or conceptions of human liberties' as they existed in the Nineteenth Century. (Fn. omitted.) (Fortson v. Morris (1966), 385 U. S. 231, 247, 87 S. Ct. 446, 454, 17 L. Ed. 2d 330; Fortas, J. dissenting.) Our task is to decide whether 'the challenged provision is compatible with the demands of equal protection as they apply in contemporary society.' (Castro v. State of California (1970), 2 Cal. 3d 223, 231, 85 Cal. Rptr. 20, 25, 466 P. 2d 244, 249.) This means, since 'notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change' (Harper v. Virginia State Bd. of Elections (1966), 383 U. S. 663, 669, 86 S. Ct. 1079, 1083, 16 L. Ed. 2d 169), that the constitutionality of article XI, section 18 must be determined not only in light of the need for and effect of the provision under present conditions, but also in light of the greatly expanded protection we have afforded to the right to vote."

The California Supreme Court continues at page 859:

"Nor do we believe that the two-thirds requirement may be justified as a method of protecting real property owners from additional taxes necessary to service the higher level of bonded indebtedness which it is reasonable to assume would result were bonds to be issuable upon simple majority approval. We express no opinion as to whether or in what circumstances the state may structure its election laws to accommodate

the financial interests of property owners. Assuming, arguendo, this to be a legitimate state interest, *we do not believe that under contemporary conditions it is so compelling as to justify depriving petitioners of their right to a fully effective vote.*" (Emphasis supplied.)

Thus, as indicated in the foregoing cases, no state interest is so compelling that it can override the individual citizen's right to an equally weighted vote in any instance in which a proposition affecting the health, welfare, or education of the citizen or his dependents is being submitted to a popular vote.

CONCLUSION

The extraordinary majority voting requirements of the West Virginia constitution and statutes, which require a three-fifths voter majority for school bonds and school tax levies, have been held by the West Virginia Supreme Court of Appeals to be in violation of the provisions of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

The "Committee for the Equal Weighting of Votes" respectfully urges this Court to affirm the decision of the Supreme Court of Appeals of West Virginia.

Respectfully submitted

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